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TABLE OF CASES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 402

ARTHUR GREENWOOD, ET ALS.,
Petitioners,

vs.

HOTEL & RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE AND BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, ET ALS.,
Respondents.

BRIEF ON BEHALF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

EARL MCBEE and J. L. BUSBY,
Attorneys for Respondents.

STATEMENT AGAINST JURISDICTION

I

Application for rehearing in this case was denied by the Alabama Supreme Court on June 12, 1947. Counsel for respondents were served with a copy of the petition for writ of certiorari and brief in support of the same on November 25, 1947. It does not appear from the petition, nor the brief in support thereof, that an extension of time was granted as provided by statute (Title 28, U.S.C.A. Section 350). In

the absence of such extension the application was filed after three months, hence was too late.

II

Jurisdiction is sought to be invoked by petitioners under Section 237 (b) of the Judicial Code (U.S.C.A. Title 28, Section 344 (b)). Obviously jurisdiction is related specifically to that part of the above statute which reads "or where any title, right, privilege, or immunity is especially set up or claimed by either party under the Constitution, or any treaty or statute of, or Commission held or authority exercised under, the United States;". Specifically, petitioners contend that they have been deprived of their property without du process, have been denied equal protection of the law and have had abridged and impaired their right to contract.

Petitioners here, were complainants in the original trial court. The alleged wrongs of which petitioners complained and the delineation of their alleged rights were exclusively set up in the bill of complaint as amended. The pertinent parts thereof are quoted on pages eight and nine of the petition. It appears that no where was any claim of right, privilege or immunity under the Federal Constitution presented to the trial court. Likewise nothing in the record indicates that such claim was ever presented to the Supreme Court of Alabama.

Even tho raised, if for the first time on application for rehearing in the Supreme Court of Alabama, it came too late. That Court did not consider such questions but denied the application for rehearing without opinion.

Under the above circumstances certiorari to this Court will not lie.

Mutual Life Insurance Company v. *McGrew*, 188 U. S. 291, 23 S. Ct. 375, 47 L. Ed. 480, 163 L. R. A. 33;
Jacobi v. *Alabama*, 187 U. S. 133, 23 S. Ct. 48, 47 L. Ed. 106;
Moore v. *Mississippi*, 88 U. S., 21 Wall 636, 22 L. Ed. 653;
Bolling v. *Lersner*, 91 U. S. 594, 23 L. Ed. 366;
Brown v. *Atwell*, 92 U. S. 327, 23 L. Ed. 511;
Louisiana v. *La. Board of Liquidation*, 98 U. S. 140, 25 L. Ed. 114;
De Saussure v. *Gaillard*, 127 U. S. 216, 32 L. Ed. 125.

III

Finally, respondents submit that the Supreme Court of Alabama, in its opinion and decree did not decide any Federal question of substance not theretofore determined by this Court. But, to the contrary, followed the applicable decisions of this Court. S. C. Rule 38, Subdivision 5 (a). We shall elaborate this contention in our argument.

STATEMENT OF THE CASE

Respondents deem it necessary to call attention to inaccuracies and omissions in the statement of the case given by petitioners. These may be classified as follows: First, Greenwood did not agree to recognize the unions prior to the strike, but to the contrary did not agree to anything; second, the Greenwoods and their supervisory employees engaged in a considerable amount of anti-union activities while the cafe was in process of being organized; and, third, there was no unlawful conduct, coercion, intimidation, threats, force, violence, abusive epithets or any thing of like kind in the manner in which the strike was conducted.

The Greenwood Cafe, employing around 20 to 22 people (R. 42), was in process of being organized by respondent union during the two or three weeks immediately before

the strike and picketing complained of. During that time all but two or three of the employees became members of Local 454 (R. 38, 41). These union employees decided to have the Union serve as their bargaining agent and to obtain a collective bargaining agreement with the employers (R. 41, 72, 107, 339, 344).

In the meantime the employers became aware of the effort being made to organize the cafe. At one time a customer left a note at the cashier's desk calling attention to the unionization of the employees. Spiro Greenwood, one of the partners showed this note to some of the employees demanding to know if they were "one of these". When they admitted membership or sympathy for the Union he argued against the Union by declaring that the obligations of union membership would require them to picket the cafe, a task which he obviously thought would be considered unpleasant by a group made up largely of young ladies (R. 151, 153, 307, 308).

One of the employees to whom such statements were made was Sharp, the man who occupied the position of head waiter and through whom instructions were issued by the owners to the other waiters and waitresses, and who exercised other supervisory authority (R. 154, 155). Spiro Greenwood testified that immediately after this incident Sharp came to him to obtain help in the drafting of the instrument which reads as follows:

> "To the Management of the Greenwood Cafe:
>
> We the undersighned do hereby declare and affirm that knowing that we are receiving the highest wages and work less hours than in any other place in the City of Birmingham or in the State of Alabama, do hereby request you not to sign up with any union local or national or to alligate us in any way diriclly or

indiriclly, as we are contended and satisfied to continue working as we have been heretofore.

Respectfully, ---------- ----------, ---------- ----------;
---------- ----------, ---------- ----------, ---------- ----------."

(Respondent's Exhibit 1, R. 368 introduced into evidence R. 109).

Spiro Greenwood admitted that this document was drafted for the purpose of serving as a declaration against the Union by those who signed and was written in his own hand-writing and delivered by him to one of the waitresses to be turned over to Sharp. Likewise he admitted he assisted Sharp in circulating this document among the employees by keeping it at his desk during times when it was not being passed around (R. 141-143).

In addition, Arthur Greenwood, one of the partners admitted discussing the unionization of the employees with the chef about ten days before the proposal for a collective bargaining contract was submitted (R. 227, 228). The undisputed evidence is that the chef then became very active in opposition to the Union and told employees that if they wished to continue to work at Greenwood's they had better not join the union. This fact was communicated to the Union office (R. 316, 361).

On Tuesday, September 3rd, according to Arthur Greenwood's testimony, Mr. Hacker, the union representative called on the telephone to remonstrate with the employers because of the circulation of the petition or contract quoted above (Respondent's Exhibit No. 1). In his testimony Arthur Greenwood says that this was referred to by Hacker as a "yellow-dog" contract. Greenwood's reply to Hacker was that he did not know anything about such a contract and referred Hacker to his brother, Spiro, who was the

partner who handled all matters pertaining to the employees (R. 201, 228).

The next day, Wednesday, September 4th, Hacker, accompanied by Hardwick, went to the Greenwood Cafe to confer with petitioners through their spokesman, Spiro Greenwood. One of the first things done by the Union representatives was to complain of this and other anti-union activity on the part of the employers. At this time Spiro Greenwood denied that he had any knowledge of this petition which was being circulated among the employees and which was intended as a declaration against the Union by those who signed it (Hacker, R. 341; Greenwood, R. 298).

At this time, the preliminary contract draft which had been prepared by Hacker was submitted to the Greenwoods as a basis for negotiation. The employers requested until Friday, September 6th to allow them time to consult their attorney about the proposal.

The union representative then explained to Greenwood that because of acts of intimidation being carried out against the employees he would like an answer when he returned on Friday (R. 342).

On Friday, Spiro Greenwood, speaking for the petitioners, refused to give any answer, but stated that their attorney would be back in town the following Monday. At that time Mr. Greenwood did not offer to sign a contract recognizing the Union as bargaining agent for the Cafe's employees, but to the contrary refused to agree on anything. Likewise, he made no proposal at either conference to the employees or their representative to arbitrate any differences that might exist between the employees and the employers (R. 343). In fact, Spiro Greenwood himself testified that he at no time during the interview of either Wednesday or Friday made any commitment of any kind to the employees' representative. He did not agree to recognize the Union as their

bargaining agent, but as a matter of fact had not decided that he would be willing to sign any contract whatever with the Union (R. 156, 162, 163). The undisputed evidence is however, although he claimed inability to obtain legal advice he admitted at the Friday conference having instructed his counsel to prepare a letter to be sent to all of the employees explaining the Union to them and asking them to declare themselves as to whether or not they wanted the Union (R. 358). Spiro Greenwood testified that it was at this point in the Friday Conference that Hacker said they could no wait any longer (R. 140). Hacker's testimony is that this conference ended with his explanation to Greenwood that no further time could be given without some definite commitment on the part of the employers because of the anti-union activity being engaged in by the employers (R. 343, 358, 359).

The employees and the Union representatives had agreed that a strike would begin if it appeared at the interview on Friday that the Greenwoods were continuing their stalling tactics (R. 68, 69, 80, 342, 344). The picket signs had been prepared in advance because of the anti-union activity going on in the cafe since the employees began to organize (R. 360).

According to Arthur Greenwood's testimony, a quarter to twelve on Friday, September 6th some of the employees began picketing the cafe and others joined them during Friday afternoon. The picketing ended on the service of the injunction at 5:32 p.m. on Saturday, September 7th. He says that he did not have sufficient help to operate anything but the counter and sell sandwiches, beer and ice cream on Friday afternoon and on Saturday the cafe was closed all day because of the lack of help (R. 208, 230, 231). He further testified that after the employees left their places of employment, he and his partners served all of the food that

they had help to handle (R. 231). This clearly shows that no loss of patronage was suffered because of the picketing, but the curtailment of petitioners' business was due to the absence of the employees. In addition the cafe was closed almost during the entire time the picketing was in progress and up until the bill was filed to initiate this litigation. In the light of these facts the attempt by petitioners to make a case of coercion, intimidation and interference with their customers is rather difficult to understand.

The Supreme Court of Alabama, after carefully considering the record, concluded:

> "We are unable to say from the record before us that up until the time of the preliminary injunction the strike was unlawfully conducted, or that there were any unlawful incidents in connection with the picketing" (R. 387).

In this, they are supported by the overwhelming weight of the evidence. Petitioners, complainants, did offer testimony of one Holman, who claimed that on Saturday morning, he was merely brushed against by two pickets who passed the entrance when he appeared at the door to gain admittance. At first he tried to pose as a customer but was in fact a part time employee. His testimony, to say the least, did not stand up very well on cross examination (R. 95-101). They also introduced the testimony of a salesman who came to make a regular call on his customer, the Greenwoods, but was advised that the cafe was closed and the door locked. He was told that he could gain admittance by going to the rear door, which he did without interference. (R. 125-127). As against petitioners' claims, each of the employees who appeared upon the picket line denied that they had blocked the doorways or in any manner interferred with any customer or prospective customers; denied that they had in any way at-

tempted to prevent or persuade any person from entering the cafe, and directly contradicted the testimony of Holman (R. 250, 251, 260, 262, 275, 327, 348). In addition the cafe was closed to customers all day Saturday making it impossible for any one to interfere with them even had there been a desire to do so.

There was no evidence of any kind any where in the record showing any violence on the part of the pickets, or any one else.

ARGUMENT

PROPOSITION ONE

The Supreme Court of Alabama correctly held, in substance, and properly applied the decisions of this Court, that Respondents were legally entitled, and did srike and picket for the purpose of obtaining union recognition, that is, a collective bargaining agreement on behalf of the employees through the agency of the union.

Argument by petitioners, that the signs worn by the pickets to the effect that they were on strike for higher wages and union recognition were false and untrue in that the Greenwoods did agree to recognize the union, is not supported by the record. In our statement of the case we have endeavored to point out the testimony, including that of Spiro Greenwood, one of the partners and the spokesman for the partnership, which clearly shows the fallacy of such argument. Resourceful and energetic as they, and their counsel may be, there is no escape from the plain facts of the record. The Supreme Court of Alabama correctly found that "the strike was inaugurated because he (Greenwood) would not then agree to anything" (R. 386).

For this utterance petitioners now take that Court to task (Petition 6). It is appropriate to remark that in so doing no part of the record is cited to support such contention. Only a vague reference is made to Greenwood's offer to negotiate and arbitrate. A thorough reading of the record will fail to show any such offer made at any time before the strike began on Friday morning. It is true, there was some discussion on Saturday morning after the strike had been in progress some 24 hours. It was at this time that counsel for the employers stipulated certain conditions upon which they would be willing to negotiate with respect to a contract with the Union. The first condition was that the strike be immediately called off and the pickets removed. The second condition was that in the event of a failure to reach agreement the Union must commit itself to compulsory arbitration. The Union, speaking on behalf of the employees, was unwilling to agree to these conditions. They took the position that the employers were merely continuing their stalling tactics (R. 351).

The significance of the misinterpretation of the facts of this case by petitioners is demonstrated in the legal propositions which they present. First, it is asserted that a strike to force the execution of a proposed contract which the employers did not have a reasonable opportunity of examining and with respect to which he has been unable to obtain the advice of counsel at that time, is without a permissible purpose. In this connection an attempt is made to label the picketing by Greenwoods' employees coercive, intimidating, violent and fraudulent. Second, it is urged that submission of differences to arbitration is a condition precedent to the right to picket in the endeavor to secure a collective bargaining contract. Complaint also is made that the formalities of calling a strike as prescribed in the Union Constitution were not complied with.

We shall attempt to show the unsoundness of each of the contentions in the above order. Before doing so, however, we pause to say that the claim of equities by petitioners is confined to the alleged wrongs suffered because of the picketing. They make no claim of legal wrong in the fact of the employees having withdrawn from the services of the employers. On pages 28 and 29 of their brief is a statement of petitioner's conception of the difference between the right to quit or leave a job and the right to strike. The only difference suggested is the presence of the right to picket and exercise certain coercive measures in the latter case and their absence in the former. It is conceded that the Greenwood employees were free to leave their employment at any time they chose, with or without reason (Brief 25). It is asserted that an outsider has no right to engage in concerted action to coerce the employer into agreeing to anything (Brief 28).

To return to a discussion of the propositions urged by petitioners, we respectfully submit that the Supreme Court of Alabama found that the strike and resultant picketing were not to coerce the signing of the proposed contract in its entirety but to secure union recognition in the form of a collective bargaining agreement wherein the union would become bargaining agent for the employees upon some terms and conditions respecting wages, hours and working conditions which were left open to negotiation. This finding was compelled by the record in this case. We acquiesce in the proposition that this Court may look to the record to see whether there was substantial evidence to support the Alabama Supreme Court in its findings. We have no fear of the most searching scrutiny. We invite it.

In upholding the right of Respondents to picket for the above purpose the Alabama Court followed the cases of this Court enunciating the applicable principles of law. This

Court has authoritatively pronounced against the contention that an outsider may not engage in such concerted action against an employer. There was nothing unlawful in the fact that the employees and the union jointly engaged in picketing the Greenwood Cafe.

Senn v. *Tile Layers Protective Union,* 301 U. S. 468, 492, 81 L. Ed. 1229.
American Federation of Labor v. *Swing,* 312 U. S. 321, 61 S. Ct. 735, 85 L. Ed. 855.
Cafeteria Employees Union v. *Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

Petitioners' argument that they have been deprived of Constitutional privileges and immunities has been answered in the negative. The Alabama Supreme Court specifically found that the picketing was not of the coercive, fraudulent, intimidating or violent type denounced in *Truax* v. *Corrigan,* 257 U. S. 312, upon which great reliance is placed by petitioners. That case and others of similar import were given full recognition by the Alabama Court in its opinion. That Court simply found that the facts of this case required the application of the principles pronounced in *Senn* v. *Tile Layers Protective Union,* supra, which clearly holds that a state may authorize peaceful picketing of an employer without infringing the latter's Constitutional privileges and immunities. We submit the record fully supports the above findings of fact.

It may be remarked that even if it could be said that some acts of unlawfulness were committed by the pickets, certainly such were of a most trivial and episodic character so as not to support the blanket injunction granted by the trial court.

Cafeteria Employees Union v. *Angelos,* 320 U. S. 293, supra.

THE TIME ELEMENT

Petitioners erroneously contend that a reasonable time must elapse during negotiations, the absence of which will convert an otherwise legal purpose for a strike and picketing into an unlawful one. The Alabama Justices found that the purpose of the strike and picketing was a proper objective, namely, "to unionize the cafe and procure from its operators a union contract" (R. 383). They cite many cases to support their view that no length of time is required to elapse before coercive measures may lawfully be taken by either the employers or employees to resist or obtain such lawful objective. We join them in their statement: "We have found no case to support the contrary theory" (R. 384).

The holding of the Alabama Court is clearly rested upon the above conclusions of law and fact. In so doing it followed the pronouncements of this Court in the cases above noted and the generally accepted modern law of employer and employee relationships.

The opinion of the Alabama Court then proceeds to answer some of the various arguments presented by the Greenwoods.

On page 19 of their brief petitioners quote from the opinion and criticize a reference to the stalling tactics and anti-union activity of the Greenwoods. A reading of the context shows that the evidence of such conduct was merely taken as an added reason why petitioners were not entitled to complain of the shortness of time allowed by the employees. We quote from the opinion:

"A further observation, we think, is in order. Had the court been authorized to make such a requirement, its enforceability here might be regarded as of doubtful tenableness. For whether or not a reasonable time had been given

would depend on the circumstances and the conduct of the parties, and as heretofore pointed out, during the process of negotiation activities appeared to be working against the attempt to unionize and might have justified more precipitous action in calling the strike. See Restatement of the Law of Torts, supra, pp. 125, 137, ss. 785, 796; cf. *Solvay Proc. Co.* v. *N.L.R.B.*, 117 Fed. 2d 83, 86; *Sperry Gyroscope Co.* v. *N.L.R.B.*, 129 Fed. 2d 922, 927; *N.L.R.B.* v. *Moench Tanning Co.*, 121 Fed. 2d 951, 953; *Int. Ass'n of Mch'ists* v. N.L.R.B., 311 U. S. 72; *Heinz & Co.* v. *N.L.R.B.*, 311 U. S. 514, 521; *N.L.R.B.* v. *Link Belt Co.*, 311 U. S. 584, 588.

"We have tried to illustrate the error of the decree in declaring the strike unlawful for the alleged failure of the strikers to accord plaintiffs more time to consider the unions' demands. This was where the decree was rested, but argument is made here that it can be saved for affirmance on the further ground that, allegedly, the contract contained illegal provisions rendering unlawful a strike to coerce its execution.

"As stated, the decree was founded on a different premise, but if an answer is due, it will be noted, first, that no particular provisions in the contract was insisted on by the union or the employees and both sides seemed to agree in the testimony that it was submitted as a bargaining basis only. In appraising the evidence the impartial mind could not but be impressed that the strike was precipitated as the combined result of the deferring tactics of Greenwood, genuine though his purpose may have been, and the suspicion of the employees and the union representatives of losing their cause by further delay.

"Secondly, we do not interpret the proposed bargaining agreement as containing illegal provisions." (R. 384, 385).

The following words of Mr. Justice Roberts support the Alabama Court in the above conclusions:

"The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute."

> *National Labor Relations Board* v. *Mackay Radio & T. Co.*, 58 S. Ct. 904, 304 U. S. 333, 82 Law Ed. 1381.

While there is no legislative enactment in the State of Alabama comparable to the National Labor Relations Act, and similar Acts of other states, it is clear that the Greenwoods were guilty of an unfair labor practice within their purview. Anti-union activities engaged in by these employers and supervisory employees, such as Sharp, are condemned by such legislative enactments.

> *Heinz & Co.* v. *N.L.R.B.*, 311 U. S. 514, 521;
> *National Licorice Co.* v. *N.L.R.B.*, 309 U. S. 350, 2 L. C. 17056;
> *N.L.R.B.* v. *Sunshine Mining Co.*, 110 Fed. 2d 780, 792;
> *N.L.R.B.* v. *Abell*, 97 Fed. 2d 951;
> *Va. Ferry Corp.* v. *N.L.R.B.*, 101 Fed. 2d 103.

How then, can it be seriously urged that the Supreme Court of Alabama deprived petitioners of their Constitutional rights and privileges in taking cognizance of such conduct of the Greenwoods? If this question should be answered in the affirmative, it would follow that these legislative enactments are, in this particular, unconstitutional and invalid. This Court has consistently held that they are not.

PROPOSITION TWO

The decision of the Supreme Court of Alabama

in no way violates the Constitution of the United States by abridging or impairing petitioners' right to contract.

Petitioners make the most unusual argument that their Constitutional rights were abridged by the Supreme Court of Alabama because that Court held that neither the employer nor the employee could be required to submit to compulsory arbitration of disputes arising during the negotiations for a collective bargaining contract. Such argument is unsound. To exact a requirement of compulsory arbitration in the process of arriving at the terms of a contract is not to enlarge freedom of contract, but to abridge and restrict it. A contract imposed upon two parties by mandate of a board of arbitration and under compulsion of law is in no sense of the word a contract freely made and entered into by the parties. It is the very opposite.

Had the Legislature of Alabama enacted a law requiring parties in such a case as this to submit any differences on contractual terms to compulsory arbitration, we respectfully submit that such enactment would be unconstitutional because it deprives both sides of their right of freedom of contract. We suppose that such statute would be attacked on this Constitutional ground. We can well imagine that in such event the State of Alabama would make the argument now offered by petitioners that such a law should be upheld on the theory that the public welfare demands a restriction of the rights of parties to make their own contract.

However, when urged by these petitioners it is an obvious absurdity. It is not appropriate to vindicate the Constitutional right under consideration, but only to strike it down. Petitioners cannot consistently step from the role of contracting party, intent upon preserving the right to freely con-

tract, into that of public advocate, burdened with the duty to ignore private rights in the interest of the public weal. They cannot claim the rights of the latter to urge Constitutional privileges of the former. The two principles directly oppose each other. Petitioners cannot rest their case for freedom of contract upon the alleged Constitutional rights and well being of the public. They must stand or fall upon their own rights. They have no proprietary interest in the public welfare which they may urge to sustain a claim for a purely personal Constitutional privilege or immunity.

To state our position in simple language, we say petitioners cannot make a claim of Constitutional abridgment of their freedom of contract because their employees were *not* required to enter into compulsory arbitration. For that matter, we also say that it is our conviction that petitioners' Constitutional rights were in no wise abridged or impaired by the decision of the Alabama Court, for this or any other reason.

Moreover, the Supreme Court of Alabama was completely without authority to judicially enact legislation requiring compulsory arbitration of disputes arising during negotiation for a collective bargaining contract. Whatever authority there might be to enact such requirement resides in the Legislature. The Supreme Court of Alabama correctly held that any effort to exact such a requirement is necessarily legislative and not judicial (R. 383).

We do not believe authority to support the soundness of this conclusion is necessary. However, it is interesting to note the similarity in the view point expressed by the Alabama Court, and that of Mr. Justice Brandeis, who made the following statement:

> "Because I have come to the conclusion that both the common law of the state and a statute of the United

States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. *But it is not for our judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.*" (Italics ours).

Duplex Printing Press Co. v. *Deering*, 254 U. S. 443, 488, 41 S. Ct. 172, 184, 65 L. Ed. 349, 16 A.L.R. 196.

PROPOSITION THREE

Petitioners can claim no violation of their Constitutional rights because of a failure of Respondents to comply with the Union Constitution.

In the first place there was no violation of the Union Constitution in the calling of the strike. Hacker was a representative of the International Union and was Trustee for the local Union (R. 349, 350). This trusteeship was necessary to clear up a "racketeering mess" resulting from a company dominated union (R. 349, 358, 359). As such Trustee and international representative Hacker had Constitutional authrity to call a strike whenever he thought it was wise to do so. (R. 353).

Even though Hacker had authority to call the strike, it is worthy of note that he did not do so until the employees had decided in favor of it (R. 68, 69, 344).

But even if the Union Constitution had been violated the petitioners would not be entitled to complain. The Supreme Court of Alabama correctly so held. The Constitution of the Union is merely the contract between the Union and its members. No equitable right is conferred upon the employer under it.

Respectfully submitted,
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J. L. BUSBY,
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